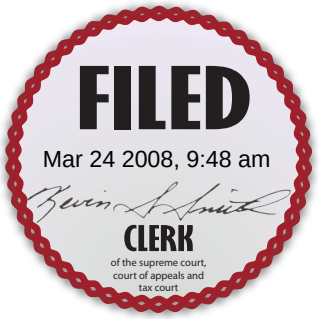

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IN THE COURT OF APPEALS OF INDIANA

THE CITY OF EAST CHICAGO, INDIANA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A03-0710-CV-470
	)	
HERBERT S. LASSER and ALMA E. LASSER,	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-0602-CT-1438

March 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

The City of East Chicago ("East Chicago") appeals the trial court's judgment in favor of Herbert and Alma Lasser for $103,490.07 plus attorney fees. We affirm.

Issues[1]

East Chicago raises two issues, which we restate as:

I. whether the trial court properly concluded that East Chicago should not have removed fixtures from real estate owned by the Lassers; and

II. whether the terms of a lease entered into by the parties controlled for purposes of the assessment of property damages and the award of attorney fees.

Facts

On July 16, 2003, East Chicago entered into a four-year lease of warehouse and office space owned by Cardinal Harbor, LLC ("Cardinal"). Pursuant to the lease, East Chicago was required to make quarterly lease payments and pay any applicable property taxes. The lease provided, "All alterations, additions or improvements to or upon the leased premises (except LESSEE'S business fixtures, furniture and equipment) shall remain upon and be surrendered with the premises at the end of the term without damage or injury." App. tab 6 p. 10. The lease also stated that if either party was required to

[1] In the Conclusion of their brief, the Lassers ask us to determine that the parties did not enter into a lease termination agreement and that they should be awarded damages based on the original lease agreement. However, because the Argument section of their brief does not expressly contain arguments supported by citation to authority on this point, this issue is waived. See Ind. Appellate Rule 46(A)(8). Also, in its reply brief, East Chicago argues for the first time that the original lease agreement is void based on Indiana Code Section 36-4-8-12(b). However, a party may not raise an argument for the first time in its reply brief. See Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 977 (Ind. 2005) ("The law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived."). This issue is waived.

employ the services of an attorney to represent it in litigation against the other party, the prevailing party "shall be" entitled to recover reasonable attorney fees. Id. at 13.

On March 14, 2005, the Lassers purchased the building from Cardinal, and Cardinal assigned the lease to the Lassers. At the same time, East Chicago stopped paying rent and was behind in its payment of property taxes. East Chicago owed $22,248.00 in rent and $36,274.45 in property taxes.

On March 15, 2005, the Lassers sent a notice of default to East Chicago. On March 17, 2005, East Chicago advised Herbert, who is an attorney, that it wanted to move out of the building. On March 18, 2005 Corporate Counsel for East Chicago sent a letter to Herbert summarizing a phone call. In that letter, East Chicago agreed to the payment of the delinquent rent and taxes in exchange for the early termination of the lease. Also in the letter, East Chicago stated that it would "remove from the premises any personal property not considered a fixture." Defendant's Exhibit 1.

On March 21, 2005, Herbert sent a letter to Corporate Counsel responding to the March 18, 2005 letter. In it, Herbert stated, "it would appear that we have a meeting of the minds assuming the City of East Chicago makes its payment on or before the 30th of March, and that the wire cages bolted to the floor and ceiling and security systems are not considered 'fixtures.'" Defendant's Exhibit 2. Herbert also requested a price from East Chicago for it to leave the telephone system and workstation dividers so they would be available for subsequent tenants.

On March 23, 2005, Herbert sent Corporate Counsel for East Chicago a draft of a lease termination agreement and requested that Corporate Counsel use it as a template or

make comments to it. This draft required East Chicago to pay the delinquent rent and taxes, to vacate the premises by April 15, 2005, and to "leave the premises in a clean and sightly manner, leaving in place the existing security and surveillance systems, wire fence space dividers that are bolted to the Real Estate and all of the Lessors metal shelving that was included in the original lease." Plaintiff's Exhibit 12. The draft also provided for an award of attorney fees to be made to either party who defaults.

On April 1, 2005, Herbert sent a letter to Corporate Counsel indicating that he received a check from East Chicago in the amount of $50,063.58—$8,458.07 less than East Chicago's delinquent rent and taxes. Herbert also stated that he had not yet received an executed or approved copy of the lease termination agreement. On April 13, 2005, Herbert sent a letter to Corporate Counsel stating that because East Chicago had removed the wire cages from the warehouse, "our efforts to negotiate an amicable Lease Termination Agreement have failed." Plaintiff's Exhibit 18.

On April 17, 2005, East Chicago vacated the property. In doing so, East Chicago removed all the security equipment that had been installed in the building. For example, all of the interior metal doors had holes in them "where the city had previously installed the security door pass system." Tr. p. 34. East Chicago "took the door pass system out of the door, leaving the hole in the metal door" where one would normally find a knob. Id. All of the security equipment, both inside and out, was removed and the wires were "dangling," and there were holes in the ceiling. Id. The wire security cages, which had been bolted to the concrete floor and the steel roof trusses, were completely removed.

On February 17, 2006, the Lassers filed a complaint against East Chicago alleging that it had failed to comply with several provisions of the lease. A bench trial on the complaint was eventually held, and on August 15, 2007, the trial court issued in part the following findings and conclusions:

FINDINGS OF FACT

* * * * *

13. Negotiations between Lassers and corporate council for City continued and a "meeting of the minds" occurred. The parties agreed that City would pay the delinquent rent and delinquent property taxes, forfeit its security deposit and remove from the premises any personal property not considered a fixture. Payment of the rental and property tax arrearages would be made on or before March 30, 2005.

14. On March 30, 2005, City issued a check in the amount of $50,063.58 in partial payment of the rental and property taxes then due and owing, leaving a balance of $8,458.07 unpaid.

15. Upon vacating the Subject Property, City removed the wire cages from the warehouse portion of the Subject Property and removed the security and surveillance equipment from the Subject Property.

16. Upon vacating Subject Property, City failed to return Subject Property without damage. The roof and sides of Subject Property were damaged and the cost to repair said damage is $30,710.00.

17. The cost of reinstalling the wire cages removed by City is $39,830.00.

18. The cost of reinstalling the security and surveillance equipment removed by City is $24,492.00.

19. At trial, parties stipulated that Lassers' attorney is employed under a contingent fee agreement, calling for him to receive one-third of the gross recovery made in this case.

CONCLUSIONS OF LAW

1. Lassers and City reached a "meeting of the minds" on termination of the lease regarding the Subject Property.

2. City has breached that agreement by failing to pay in full the rental and property tax arrearages.

3. City has breached that agreement by removing wire cages and a security system which were attached to the property and are considered a fixture and part of the property.

4. City failed to return the Subject Property to Lassers without damage and should be responsible for the repair of that damage.

5. The Court concludes that City should be responsible and pay the following:

Rental and Tax Arrearage	$8,458.07
Costs of property damage	30,710.00
Replace wire cages	39,830.00
Replace security system	24,492.00
TOTAL:	$103,490.07

6. Lassers are entitled to recover attorney fees in the amount of $34,496.69.

App. tab 2. East Chicago now appeals.

Analysis

Here, it does not appear that either party requested findings and conclusions pursuant to Indiana Trial Rule 52(A) prior to the trial; therefore, the trial court entered them sua sponte. In such a case, the general judgment will control as to issues upon which the trial court has not expressly found, and the special findings will control the

issues that they cover. Clark v. Hunter, 861 N.E.2d 1202, 1206 (Ind. Ct. App. 2007). "Special findings will be reversed on appeal only if they are clearly erroneous." Id. On the other hand, a general judgment will be affirmed upon any legal theory consistent with the evidence. Id.

"To determine whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will not reweigh the evidence or assess witness credibility." Pramco III, LLC v. Yoder, 874 N.E.2d 1006, 1010 (Ind. Ct. App. 2007). A judgment is clearly erroneous if our examination of the record leaves us with the firm conviction that a mistake has been made. Id.

I. Fixtures

East Chicago argues that the wire cages and security system were trade fixtures, not fixtures. Generally, "A 'trade fixture' is 'personal property put on the premises by a tenant which can be removed without substantial or permanent damage to the premises.'" Dutchmen Mfg., Inc. v. Reynolds, 849 N.E.2d 516, 520 (Ind. 2006) (quoting 14 Ind. Law Encyclopedia Fixtures § 14 (2004)). A "fixture," on the other hand, is "'[p]ersonal property that is attached to land or a building and that is regarded as an irremovable part of the real property.'" Indiana Dep't of Natural Res. v. Lick Fork Marina, Inc., 820 N.E.2d 152, 156 (Ind. Ct. App. 2005) (quoting Black's Law Dictionary 652 (7th ed. 1999)) (alteration in original), trans. denied, cert. denied, 546 U.S. 875, 126 S. Ct. 386.

To determine whether an article has become so identified with real property as to become a fixture, we use a three part test that considers: "1) actual or constructive

annexation of the article to the realty, 2) adaptation to the use or purpose of that part of the realty with which it is connected, and 3) the intention of the party making the annexation to make the article a permanent accession to the freehold." Dinsmore v. Lake Elec. Co., Inc., 719 N.E.2d 1282, 1286 (Ind. Ct. App. 1999). "Intention may be determined by the "'nature of the article, relation and situation of the parties making the annexation, and the structure, use, and mode of annexation.'" Id. (citation omitted). The third part of the test is controlling, and if there is doubt as to intent, the property should be considered as personal. Id. at 1287.

Here, the wire cages and security system were annexed to the property. Holes were cut in the doors to allow key card access, video cameras were fixed to the ceiling, a considerable amount of wiring within the building was necessary for the security system to function, and the wire cages were bolted to the concrete floor and the ceiling trusses.

As for use or purpose, the building was used by East Chicago for record storage and as a sign shop. The security system and wire cages kept the records more secure. Herbert testified that he had been talking to hospitals about using the building for storage and that "without the wire cages providing security record storage, I would have had no interest in the building." Tr. p. 27. Herbert further testified:

> Also the building is located in the city of East Chicago and they had a very elaborate security system both inside and out, which I thought was critical to owning real estate in East Chicago, and particularly if I was going to have valuable records placed therein. So it was just absolutely imperative that the security system stay as is, and the that cages, which had sliding fence doors that you can lock individually, a very elaborate system.

Id. at 27-28. The purpose of the installation of the security system and wire cages was clearly to provide a secure facility in East Chicago.

As for the third element, East Chicago argues that its intent was to remove the cages and security system from the premises. In support of this argument, East Chicago refers to the letters exchanged by the parties discussing the termination of the lease. We do not believe that the focus should be on what the parties intended at termination of the lease agreement. To hold otherwise would allow the parties' intent at the time of the events leading to the litigation to control whether an item is considered a fixture. We conclude that it is a better practice to consider the parties' intent at the time the items were installed.

There is little evidence here of East Chicago's intent regarding the security system and wire cages prior to its desire to terminate the lease agreement. However, given the integrated nature of the security system and the wire cages it is difficult to conclude that East Chicago could have intended for them to be considered personal property. This is especially true when considering the provisions of the lease requiring that all improvements except business fixtures, furniture, and equipment remain with the premises and that the removal of business fixtures shall be done without defacing the property. The lease clearly distinguished between fixtures and business (or trade) fixtures, and the highly integrated security measures were installed nevertheless.

This brings us to East Chicago's next argument that the security system and wire cages were simply trade fixtures and that the parties recognized them as such. Based on the parties' letters in the spring of 2005, the evidence is, at best, less than the clear as to

whether the parties considered the security measures to be fixtures or trade fixtures. Further, it is undisputed that the security system and wire cages could not be removed without substantial damage to the premises; such damage in fact occurred. The security system and wire cages were not trade fixtures. See Milestone Contractors, L.P. v. Indiana Bell Telephone Co., Inc., 739 N.E.2d 174, 178 (Ind. Ct. App. 2000) (concluding that because the removal of buried cables would substantially destroy the realty in which they were housed, the cables were not trade fixtures).

II. Liability under Original Lease Agreement

East Chicago also argues that the original lease agreement was merged into the termination agreement and that the trial court improperly awarded the Lassers damages and attorney fees pursuant to the original lease agreement. Assuming there was a valid termination agreement, we do not agree with East Chicago that it was a substitute for the original lease. As East Chicago acknowledges, "It is an old rule in Indiana that where a contract embraces the entire substance of a former contract, with some variations, the first contract is merged in the second." Skaggs v. Merchants Retail Credit Ass'n, Inc., 519 N.E.2d 202, 204 (Ind. Ct. App. 1988).

Here, the termination agreement did not embrace the entire substance of the former contract. At the most, it included a settlement provision and terms for the removal of fixtures. Further, the termination agreement contains no express indication that either party intended to repudiate the original lease agreement. We cannot conclude that the original lease agreement was merged into the termination agreement. The trial

court properly awarded the Lassers property damages and attorney fees pursuant to the original lease agreement.

Conclusion

The security system and wire cages were fixtures, and East Chicago improperly removed them when it vacated the property. The original lease agreement did not merge into the termination agreement. We affirm.

Affirmed.

SHARPNACK, J., and VAIDIK, J., concur.